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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1690

HALLMARK INDUSTRY,

Petitioner,

vs.

HONORABLE ROBERT F. PECKHAM, Judge of the United States District Court for the Northern District of California,

Respondent,

And

REYNOLDS METALS COMPANY, and STANRAY PACIFIC CORPORATION,

Real Parties in Interest.

Brief for Real Parties in Interest in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Real Parties in Interest Reynolds Metals Company ("Reynolds") and Stanray Pacific Corporation ("Stanray") respectfully request that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

A. The District Court for the Northern District of California.

The jury in this case returned its verdict for plaintiff and against defendants Reynolds and Stanray on June 24, 1970, judgment was entered thereon on June 29, 1970, and defendants moved on July 9, 1970, within ten days of the entry of judgment, for judgment notwithstanding the verdict ("j.n.o.v."), or in the alternative, for a new trial.

Petitioner moved to strike as untimely defendants' post-trial motions on the ground that the entry of the jury verdict, rather than the entry of judgment, started the running of time for post-trial motions. (Petition for Writ of Certiorari ("P.C."), Appendix E) The lower court's denial on September 8, 1970, of this motion to strike is unreported. On December 11, 1970, following extensive briefing and oral argument by all parties, the District Court by written opinion granted the post-trial motions. *Hallmark Industry v. Reynolds Metals Company,* et al., ... F. Supp. ..... (N.D. Cal. 1970); 5 *CCH Trade Reg. Rep.* para. 73,409. (P.C. Appendix F)*

B. The Court of Appeals for the Ninth Circuit.

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, Petitioner herein then sought in the Court of Appeals for the Ninth Circuit a petition for writs of mandamus and/or prohibition compelling the District Court to vacate its granting of defendants' post-trial motions and to reinstate the verdict. The only ground stated for the granting of this extraordinary writ was the same as that urged in the motion to strike—that defendants'

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*Petitioner has appealed on the merits from the judgment for defendants, and that appeal now is pending in the Court of Appeals for the Ninth Circuit, No. 26729.

motions allegedly were untimely. The Court ordered that a responsive brief be filed (See Appendix I hereto), and upon consideration of the briefs, and without oral argument, it denied the petition. The Court's order is unreported but does appear as "Appendix G" to the Petition for Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The sole question presented by the Petition is whether judgment was entered in this case under Rule 58 of the Federal Rules of Civil Procedure on June 24, 1970, as Petitioner urges, when the clerk filed the jury verdict and simply noted in the docket "Filed jury verdict" or rather on June 29, 1970, as defendants urge, and as both courts below have held, when the clerk prepared, signed, and filed a document entitled "Judgment", on approved F.R.C.P. Form 31 (Entitled "Judgment on Jury Verdict"), made a notation in the Civil Docket commencing with the words "Entered Judgment filed June 29-70 . . . .", and gave notice to all parties that "Decree Judgment is entered of record in this office in the above-entitled case."

STATEMENT OF THE CASE

No amount of Petitioner's rhetoric about national economic policy, the significance of the antitrust laws or the right to a jury trial can obscure the fact that the Petition raises nothing more than a simple, routine and well-settled question under F.R.C.P. 58. That question concerns when judgment was entered following a jury verdict, so as to commence the ten day period within which defendants had

to file their post-trial motions. Rule 58, as amended in 1963, is clear and explicit on this point. The applicable provisions of the Rule require that to have an effective entry of judgment following a general jury verdict, the clerk shall prepare, sign and enter the judgment, and the judgment must be set forth on a separate document. In the present case, the clerk complied precisely with these requirements on June 29, 1970—and not before that date—and defendants filed their post-trial motions within ten days thereafter. Both of the courts below determined that the judgment was entered on June 29, 1970. The record applicable to this question was fully before both lower courts, and may be briefly summarized as follows:

Wednesday, June 24, 1970

Late in the day, the jury in this case returned its verdict finding for plaintiff and against defendants Reynolds and Stanray but for defendant Harvey Aluminum (Incorporated), and setting damages at $211,800. After the jury was discharged, a colloquy between the court and counsel ensued concerning the scheduling of the briefing and the arguing of the post-trial motions. At that time the trial judge stated his expectation that judgment would be entered that same day.* *However, no judgment, in fact was filed or entered that day.* The Civil Docket for June 24 (P.C., Appendix D) shows merely a minute entry reflecting the result of the further deliberations of the jury, and then a separate entry, numbered 188, stating simply "Filed Jury

*Petitioner contends that defense counsel ". . . understood that the judgment was immediately entered on June 24 . . . ." (P.C. p.11). This statement is not true, as a reading of the relevant portions of the transcript makes clear. What the record does show is that defense counsel recognized that they would have ten days to file post-trial motions from the time judgment was, in fact, entered. (P.C. Appendix B, p.9)

verdict." The only paper filed was the verdict, signed by the jury foreman.

Monday, June 29, 1970

The clerk prepared, signed and filed a separate document entitled "Judgment". (P.C., Appendix C) The Civil Docket reflects that on the same day the clerk noted the "entry of judgment" and stated the substance thereof. (P.C. Appendix D.) Further, on the same day the clerk mailed a notice to all parties, including Petitioner, which stated as follows: "YOU ARE HEREBY NOTIFIED that on June 29, 1970 a *DECREE JUDGMENT was entered* of record in this office in the above-entitled case." (Appendix II, emphasis added.)

In its Petition, Hallmark makes a claim not previously asserted in these proceedings—to wit, that the June 29, 1970 judgment " . . . was entered at the request of attorneys for Reynolds and Stanray." (P.C., p. 3) Petitioner cites no record support for this assertion. In fact, it is completely false, and is totally unsupported by the record of this case. The clerk performed his duties on June 29, 1970, pursuant to the mandate of Rule 58, and without communication or request from attorneys for defendants.

Thursday, July 9, 1970

On this day, ten days after the docket notation reflecting entry of judgment as of June 29, 1970—a fact made a matter of record in the notice mailed from the Court (See Appendix II)—defendants filed their motions for judgment notwithstanding the verdict or, in the alternative, for a new trial.

These motions were subsequently argued on September 8, 1970, and granted by "Memorandum and Order" on December 11, 1970. (P.C., Appendix F) Judgment for defendants was entered on January 8, 1971.

With this record before them, the trial court and the Court of Appeals for the Ninth Circuit both determined that for purposes of F.R.C.P. 58—and F.R.C.P. 50 and 59—judgment was entered on June 29, 1970, and that defendants' post-trial motions, filed on July 9, 1970, thus were timely filed and within the jurisdiction of the court. Indeed, the courts below could have reached no other conclusion under the explicit provisions of the Rules.

ARGUMENT

I. The Decisions Below Were Clearly Correct; Rule 58 Was Followed Meticulously Resulting in Entry of Judgment on June 29, 1970 and Defendants' Post-Trial Motions Were Timely.

For purposes of a motion for judgment notwithstanding the verdict (F.R.C.P. 50(b)) and a motion for a new trial (F.R.C.P. 59(b)) it is clear that the moving party must file his motion within ten days after the entry of judgment.

The two Rules have not always incorporated the same time limits for filing. Prior to 1963, Rule 50 required a motion for j.n.o.v. to be filed within ". . . ten days after the reception of a verdict," whereas Rule 59(b) required a motion for a new trial to be made within ten days after *entry of judgment.* In 1963, Rule 50 was amended to adopt "entry of judgment" as the applicable time limit, and thus to make the ". . . time provision . . . consistent with that contained in Rule 59(b) . . . ." Committee Note, 5 *Moore's Federal Practice,* para. 50.01[13] at 2312.

Petitioner's assertion in this matter must, of necessity, rest on the theory that verdict and judgment somehow are identical in federal jury trials. Indeed, Petitioner states in so many words that ". . . courts have been . . . explicit in regarding the verdict and the judgment as synonymous."

(P.C., p. 36) If this were so, of course, the 1963 amendment to Rule 50 would have been meaningless. In fact, however, it was not meaningless: it has been well settled before and after the amendment that verdict and judgment are separate and distinct stages of federal litigation, and the salutary effect of the amendment was to place parties under the *same* time limitation, regardless of the type of post-trial motion filed.

Rule 58 was also amended in 1963. As presently written, and as relevant to this case, it provides as follows:

> Rule 58 ENTRY OF JUDGMENT
>
> "Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, *the clerk*, unless the court otherwise orders, *shall forthwith prepare, sign, and enter the judgment* without awaiting any direction by the court . . . . *Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . . . .*" (Emphasis added.)

The Rule, as amended, and as applicable here, allocates to the clerk the complete function for entry of judgment, and tells him precisely what to do. It directs him, following a general verdict of a jury, as in the present case, to ". . . prepare, sign and enter the judgment without awaiting any direction by the court."

In arguing that June 24, 1970 was the date of entry of judgment, petitioner heavily relies on a statement made by the trial court in colloquy with counsel shortly after the jury had come in with its verdict:

> "The judgment has been entered as of today." (Tr. p. 3964)

Petitioner's reliance on this statement may perhaps be gauged by the fact that it is cited or referred to no fewer than eleven times in the Petition.* However, no amount of repetition can make it anything more than it was: an expression of the court's *expectation* that the Clerk would enter judgment on that day, and a basis of tentatively discussing the scheduling of further proceedings. (P.C. Appendix B) Rule 58 is clear in requiring the *clerk,* not the court, to enter judgment in this category of case. Therefore, the focus of inquiry must be on what the clerk actually *did* in conformity with Rule 58.

Nor do we have to guess at what the court intended by its statement. When Petitioner moved to strike defendants' post-trial motions as untimely, the trial judge himself, upon review of all facts now relied upon by Petitioner, including the court's own statement, held that judgment was entered on June 29, 1970, not June 24.

The 1963 amendment to Rule 58 also added the requirement that "[e]very judgment shall be set forth on a separate document"—*i.e.,* separate from some other document. In a case involving entry of judgment following a jury verdict, the Rule necessarily means separate from the jury verdict. Commentary on the amendment makes it clear that this was exactly what the draftsmen of the Rule intended:

> ". . . Rule 58, which now provides that: 'Every judgment shall be set forth on a separate document'; *i.e.* separate from an opinion or memorandum of the court. But the provision is not thereby limited to situations where the court writes an opinion. *All* judgments, whether based on a jury verdict or a decision of the court, must be set forth in writing, on separate documents." 6A *Moore's Federal Practice, 1969 Cum. Supp.,* para. 58.02, at 43.

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*P.C. pp. 2, 11, 12, 16, 21(2), 24, 27, 28, 32 and 34.

To carry out the purpose of the amendment, Form 31 ("Judgment on Jury Verdict") was approved for use as this "separate document"; that form was used by the clerk in the present case on June 29, 1970.

Finally, it is significant to note that F.R.C.P. 79 requires the Clerk to enter in the Civil Docket, among other papers, all "verdicts, and judgments" in chronological order. Upon entry of judgment, but not upon filing the verdict, the Clerk is to serve notice thereof to all parties. F.R.C.P. 77(d)

To relate these Rules to the present Petition, the only act of the clerk which occurred on June 24, 1970, was the filing and notation of the jury verdict as required by Rule 79. This document was neither prepared nor signed by the clerk, and no notice of its entry was given to the parties. Thus, none of the requirements of Rules 58 and 79 for entry of judgment had been complied with on June 24.

However, on June 29, 1970 the clerk complied with all of the requirements for entry of judgment. He prepared, signed and filed a separate document entitled "Judgment", the docket reflects that it was entered in accordance with Rules 58 and 79, *and all parties were given notice thereof pursuant to Rule 77(d)*. When defendants then filed their post-trial motions on July 9, 1970, such motions were filed within ten days of the entry of judgment, were timely, and were within the jurisdiction of the court. Nothing could be more clear or self-evident, as the decisions below illustrate.

II. There Is No Conflict Between the Decisions of the Courts Below and This Court's Decision in the Schaefer Case.

Because any objective review of the facts demonstrates beyond doubt that under the explicit provisions of Rule 58, judgment was entered on June 29, 1970, Petitioner strains to the limits of advocacy in the attempt to create some

question meriting review by this Court. Petitioner tries to summon up a conflict between the decisions below and the decision of this Court in *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). There is no conflict. The holding in *Schaefer* is completely consistent with the decisions below in this case. Moreover, *Schaefer* was decided prior to the 1963 amendment that clarified Rule 58's criteria for the entry of judgment; indeed, as we shall demonstrate below, the uncertainties and ambiguities that required resolution in *Schaefer* led directly to the 1963 amendments.

Schaefer concerned a court decision, not a jury verdict, and the question was which of two acts, reflected in both documents and docket entries, amounted to entry of judgment—(a) an opinion of the trial court, or (b) a formal document entitled "Judgment". The question ultimately turned on what the trial court intended to be his final act in the case, for Rule 58, prior to its amendment in 1963, required the court to direct the Clerk to enter judgment as follows:

> "When the *court directs* that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith *upon receipt by him of the direction* . . . ." (356 U.S. at 231, emphasis in original)

Upon a review of the record as a whole, the Court determined that the trial court intended the document it signed entitled "Judgment" to be just that, and ruled that the later of the two acts controlled.*

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*Petitioner quotes language from the *Schaefer* opinion which would tend to indicate that the basis of the Court's decision was that the earlier of the trial Court's two acts did not sufficiently reflect the monetary amount of the award. (P.C. p. 31, fn. 2) Petitioner, however, omits a substantial and integral portion of

To the extent intention continues to be a relevant factor to a determination of when judgment is entered, it is clear that the judgment in this case was entered on June 29, not June 24. Under the applicable Rule, *the clerk* here was charged with responsibility for entering judgment. He prepared, signed and entered a separate document entitled "judgment" on June 29, and on that same day gave notice to all parties of his entry of judgment (see Appendix II); no notice whatsoever was given of the routine step of filing a jury verdict on June 24. While, as Petitioner points out, a failure of the clerk to give notice would not have extended applicable time limits for post-trial motions, in the present case the fact that such notice *was* given on June 29, 1970 is dispositive with regard to the clerk's intention and understanding that judgment was entered that day.

Furthermore, to the extent the understanding of any of the other participants is relevant, the record demonstrates that all, *including Petitioner,* understood that judgment was entered on June 29.

The trial court's understanding is most forcefully expressed by its denial of plaintiff's motion to strike defendants' post-trial motions, thus evidencing its determination that final judgment was entered on June 29, 1970.

It is also clear that defendants understood that judgment was entered on June 29, 1970. After the clerk notified them

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the quotation from the decision which added the following as additional factors relevant to the determination of intention:

> "The actions of all concerned . . . of counsel for the Government in not appealing from the 'opinion'; of counsel for respondent in preparing and presenting to the judge a formal 'judgment' on May 24; and, finally, of the judge himself in signing and filing the formal 'judgment' on the latter date—clearly show that none of them understood the opinion to be the judge's final act or to constitute his final judgment in the case." (356 U.S. at 235, 236)

that judgment had been entered on the later date, they satisfied themselves, upon looking at the docket entry, that the record did clearly reflect the entry of judgment on that day. Defendants filed their motions precisely ten days thereafter on July 9, 1970.

Finally, it is interesting that Petitioner—when it is not urging that defendants' motions were untimely—itself recognizes that judgment was entered on June 29, 1970. When plaintiff filed its Bill of Costs in this action, it recited that judgment had been ". . . entered in the above-entitled action on the 29th day of June, 1970 . . . ." (See Record for Cert., Brief in Opposition to Petition, Exhibit I) It then filed its Motion to Strike defendants' motions on the ground judgment was entered on June 24, 1970, following which on July 27, 1970, it filed a revised Bill of Costs which *again recited that judgment had been entered on June 29, 1970.* (See Record for Cert., Brief in Opposition to Petition, Exhibit J) Indeed, counsel for Petitioner seemed even to be concerned that the judgment prepared, signed and entered by the clerk on June 29, 1970 was not final, for Petitioner submitted *its own proposed form of judgment* on July 1, 1970. (See Record for Cert., Brief in Opposition to Petition, Exhibit K) That form of judgment was never signed or entered.

Thus, under the criteria considered relevant in *Schaefer*—which involved an analysis of the intentions of the court and parties—the record in the present case shows that the court, clerk and parties all understood that judgment was entered on June 29, the result reached by both courts below.

It was, however, the problems involved in determining subjective intent in *Schaefer* and other similar cases that led directly to the amendment of Rule 58 in 1963 to estab-

lish detailed *objective* criteria to determine whether judgment has been entered. The Advisory Committee in its note to the 1963 amendment to the Rule made it clear that the amendment, and particularly the new "separate document" requirement, was engendered by the confusion that led to cases such as *Schaefer*. The Committee stated:

> "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, *e.g.*, 'the plaintiff's motion [for summary judgment] is granted,' see *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal." [citing cases, including *Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958), a case heavily relied on by Petitioner, P.C. pp. 20, 24, 30, 31]
>
> "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." 6A *Moore's Federal Practice*, 1969 Cumulative Supp. Para. 58.01[8] at 41 and 42.

As we demonstrate in the preceding section of this Brief, the new objective criteria of amended Rule 58(1) require *the clerk* to prepare, sign and enter a separate document constituting the judgment, which was beyond any doubt accomplished in this matter on June 29, and not before.

III. There Is No Conflict Between the Decisions of the Courts Below and Decisions in Other Circuits.

In a similarly spurious attempt to manufacture a conflict between circuits, Petitioner cites two Third Circuit cases which it contends stand for the proposition, not followed by the courts below in the present case, that verdict and judgment are synonymous in federal litigation—*Hulson v. Atchison T. & S.F. Ry. Co.*, 289 F.2d 726 (7th Cir. 1961), *cert. denied*, 368 U.S. 835 (1961) and *Nugent v. Yellow Cab Co.*, 295 F.2d 794 (7th Cir. 1961), *cert. denied*, 369 U.S. 828 (1962) (P.C. p. 36). Indeed, in both cases the court noted that motions for j.n.o.v. must be filed within ten days of the reception of the verdict. What Petitioner does its best to ignore, however, is that at the time of both cases, Rule 50(b) required motions for j.n.o.v. to be filed "[w]ithin 10 days *after reception of a verdict . . . .*" (emphasis added, 289 F.2d at 729, 295 F.2d at 795) As noted above, in 1963 the Rule was amended to eliminate "reception of a verdict" and replace it with "entry of judgment". Thus, at the time, the determination of whether motions for j.n.o.v. were timely filed was not concerned at all with the question of when judgment was entered.*

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*Petitioner cites no case holding, under amended Rule 58, and contrary to the explicit wording of the Rule, that a jury verdict, no different in form from usual jury verdicts, and not prepared or signed by the clerk, constitutes a judgment. Neither *Hulson* nor *Nugent* stand for that proposition. The other circuit court cases cited by Petitioner as conflicting with the decisions of the courts below do not even involve jury verdicts and do not by any means suggest conflict. (P.C., p. 20, citing *Weedon v. Gaden*, 419 F.2d 303, 306-307 (D.C. Cir. 1969); *Weir v. United States*, 339 F.2d 82, 83 (8th Cir. 1965); *United States v. Evans*, 365 F.2d 95 (10th Cir. 1966); *Alloyd General Corp. v. Building Leasing Corp.*, 361 F.2d 359, 362 (1st Cir. 1966); *Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958). Each case involved the question of whether an order of the trial judge was appealable. The courts of appeals were called on in those cases to rule on the judge's intention

Indeed, not only is there no conflict between decided cases on this issue, but rather such cases as there are *amply support the decisions of the courts below.* In the recent case *Levin v. Wear-Ever Aluminum, Inc.,* 14 Fed. Rules Serv. 2d 144 (3d Cir. 1970) the jury returned its verdict and the clerk entered the substance of the verdict in the docket, but there was ". . . no judgment prepared and entered upon the verdict . . . ." (145) Plaintiff's attempt

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without the benefit of the judge's *own ruling* on that question. Here the trial judge, in ruling on Petitioner's motion to strike, has found that judgment was entered on June 29, 1970.

Moreover, even taking into account the different factual contexts of the cases, none reflects a conflict with the courts below. The appealable order in *Weedon* was an order denying a motion to vacate a default judgment. The order was not formally designated "judgment" because to do so would have been a misnomer. Even at that the court was at pains to point out that in accordance with Rule 58, the *clerk had signed and entered* the formal order the court held appealable. (419 F.2d at 305-06)

There was no issue in *Weir* as to when judgment was entered. To the extent there were two separate orders at issue, they both were entered on the same day, and the controlling one commenced with the words, "It (was) by the Court CONSIDERED, ORDERED, AND ADJUDGED . . . ." (339 F.2d at 82) It was clear that the motion for a new trial had not been made within ten days of this—or either—document.

In *Evans,* the court declined to regard a formal order and memorandum decision as final and appealable, but rather held a subsequent document entitled in part "Judgment and Order of Distribution" as controlling.

In *Alloyd,* the court held there was no final judgment in the case because the court's order did not qualify ". . . in form of substance under Rules 58, 79(a) or Form 31 [citing *Danzig v. Virgin Isle Hotel Inc., infra.*] (361 F.2d at 362)

Erstling is a pre-amendment case in which the court's first order dismissing the complaint, commencing with the words "Ordered and Adjudged" was held controlling over a later document in virtually the same words but titled "Judgment". The case involves merely an interpretation of the particular facts before the court, and provides no support to Petitioner in this case. Moreover, because of the "separate document" requirement under amended Rule 58, it is clear it would have been decided differently today. See statement of Advisory Committee, *supra,* p. 12, 13.

to regard the return and entry of the verdict as a "judgment" for purposes of noticing an appeal failed.

The court ruled that no judgment had been entered for two reasons, both directly applicable to this case. The first was because there was no judgment set forth on a separate document—separate from the verdict—as required by amended Rule 58. And the second was because even though there was a docket notation for filing of the verdict, including its amount, there was none reflecting the entry of judgment as required by Rules 58 and 79(a). Thus, the court ordered the case remanded to the district court with instruction for the clerk to ". . . prepare on a separate document, sign and enter on the docket of the court, *a judgment* . . ." (emphasis added, p. 146)

Even the pre-1963 amendment cases pertaining to entry of judgment after jury verdict do not support Petitioner. In *Brown v. United States,* 225 F.2d 861 (8th Cir. 1955), after the jury returned its verdict, the clerk made an extensive notation in the docket commencing with the words "Trial by jury, Return of Verdicts . . . ." (225 F.2d at 863) and proceeding then to state the monetary amount of the awards. Defendant took the position that these acts constituted entry of judgment, and noticed an appeal.

The Court held that no judgment had been entered, and it dismissed the appeal. It ruled that the clerk's entry of the verdict in the docket:

> ". . . represents nothing more than a performance by the Clerk of the requirement of Rule 79(a), that 'all . . . verdicts . . . shall be noted . . . in the civil docket' —a step which procedurally is coequal with that of making 'notation of a judgment', and one which is as much required in respect to verdicts on which the Clerk has no right to enter judgment as those on which he has." (225 F.2d at 863)

Further, the entry in the docket was not sufficiently clear on its face to represent unambiguously to anyone looking at the docket that judgment was entered:

> "We do not believe that anyone scrutinizing the notations in a civil docket and finding one therein, such as here, indicating the return of a verdict and its amount, with nothing more stated, could reasonably be expected to regard this as a judgment entry or even to suspect it of possibly having been so intended. Rather, we think that the legal mind would naturally assume that the Clerk either had overlooked the matter of entering judgment, or had left the matter open, on direction of the court, or because of other elements in the situation, for the taking of a subsequent step." (*Ibid.*)

The court in *Brown,* just as the courts below, refused to regard the reception of the verdict and its notation in the docket as the entry of judgment.

The same result was reached by the court in *Danzig v. Virgin Isle Hotel, Inc.,* 278 F.2d 580 (3d Cir. 1960). Petitioner suggests that the court there refused to accept the notation of the verdict as entry of judgment ". . . only because of the ambiguous nature of the first [or the verdict] entry." (P.C., p. 25) A review of the verdict notation in that case demonstrates that it was, in fact, no different from the entry in the present case—it stated who the prevailing party was and the amount of award. In words directly relevant to the present case, the court there held:

> "Since the running of time for motions after judgment and for appeal begins from the entry of judgment, such entry, though not necessarily in any particular forms of words, should be unambiguous *on its face* so that counsel or a party consulting the docket will have no reasonable basis for doubt as to the nature and effect

> of what has been done or as to the timeliness of further proceedings." (278 F.2d at 582, emphasis added.)

Thus, in both *Brown* and *Danzig,* courts refused to hold that the reception and docketing of the verdict constituted entry of judgment but rather held that a later "judgment" controlled. The same result was reached by the courts below in the present case. These decisions are in accordance with the applicable rules, and demonstrate that, quite contrary to petitioner's assertion, there is no conflict in the circuits with regard to this issue.

In an attempt to manufacture a conflict between the decision below and prior decisions of other courts, Petitioner continually asserts that defendants have argued herein, and the courts below have held, that there must be a formal document entitled, "Judgment" before federal litigation is at an end. We have not so argued. Admittedly no particular title or form of words is essential for the entry of judgment. But in a case, such as the present one, where the clerk, pursuant to his duties under Rule 58, does prepare, sign and file a separate document entitled "Judgment", that fact is virtually dispositive of when judgment is entered under Rule 58. For example, this Court in *Schaefer* held that the filing of a formal document entitled "Judgment" constituted entry of judgment for Rule 58, for one reason because the Court was ". . . unwilling to assume that he [the lower court] deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time . . . ." (356 U.S. at 235) To the same effect, in *Associated Press v. Taft-Ingalls Corp.*, 323 F.2d 114 (6th Cir. 1963), the court held that while it is not absolutely essential that the word "Judgment" be used, it was difficult to conceive of an entry of judgment without some use of the word:

> "Further we deem it significant that the memorandum opinion and entry prepared by the clerk did not include the word 'judgment'. While it is settled that there are no required forms or words to constitute a judgment, it has been said that: 'It is difficult to conceive of a Clerk purporting to engage in an act of "notation of a judgment" or "entry of the judgment" under the Rules, without some use of the term "judgment" itself in relation to the act, in view of the fixed identity and characterizing significance which the word has in the field of the law.' [citing cases]" (323 F.2d at 117)

Finally, the court in *Burke v. C.I.R.*, 301 F.2d 903 (1st Cir. 1962), recognized the ". . . general, indeed the universal, practice of the court below to express its judgments in separate documents clearly so labeled . . . ."

IV. The Petition for Certiorari Raises No Questions of Importance Which Demand or Require Consideration by This Court.

Petitioner suggests in its Petition that this matter raises questions of importance relating to the right of trial by jury, to the policy favoring the enforcement of the antitrust laws, and to the orderly administration of the federal judiciary. Each such argument is poorly taken and is nothing but a feeble attempt to add spice to an unappetizing pudding. The Petition raises no questions of importance for this Court to consider and resolve.

1. Motions for Judgment n.o.v. are not in derogation of the right to trial by jury.

It is directly asserted in the Petition that ". . . the grant of judgment notwithstanding the verdict is in derogation of the right to trial by jury . . . ." (P.C., p. 16) Such a statement is utter nonsense. The Seventh Amendment affords a right to trial by jury, and provides that ". . . no fact tried by a

jury shall be otherwise re-examined in any Court of the United States, *than according to the rules of the common law.*" (emphasis added) It is quite clear that judgments notwithstanding the verdict were recognized at common law, and thus are consistent with the Seventh Amendment. 5 *Moore's Federal Practice* para. 50.07[1] at 2354. Courts have universally held that the practice of granting judgments n.o.v. is constitutional. For example, in *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793 (4th Cir. 1959), *cert. denied*, 361 U.S. 913 (1959) the court flatly rejected as follows the same argument as that made by Petitioner herein:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linquistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences."
>
> • • • • • • •
>
> "The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objec-

tive disposition of such questions as this." (268 F.2d at 798, 799)

Neither may this Petition be afforded any stature by this wholly frivolous contention.*

2. The nature of the substantive issues raised by the merits of this case has nothing whatsoever to do with whether defendants' post-trial motions were timely filed.

Petitioner suggests that one reason for granting its Writ is that the substantive issues in this case concern the antitrust laws. Petitioner queries: "Is the right to trial by jury in *antitrust cases* so unimportant?" (emphasis added, P.C., at 15) The answer, of course, is that the provisions of Rules 50, 58, 59, 77 and 79 apply alike to *all* federal civil cases. Petitioners are neither benefited nor disadvantaged by the fact that this particular case involves an antitrust claim. As demonstrated above, judgment was entered in this case on June 29, 1970, and thus defendants' post-trial motions were timely filed. Petitioner's arguments on the merits of the disposition of those motions must be reserved for its appeal currently pending in the Ninth Circuit.

3. This petition raises no important issues concerning the orderly administration of the federal judiciary.

Petitioner suggests—over and over—that this case raises significant questions with regard to the finality of federal judgments. (P.C., pp. 16-18) In fact, the only manner in which such questions *could have been raised* by this case would have been if the courts below had decided it the other way. In that event, federal litigants would have been told that following a general jury verdict, they may no longer

*The same sort of Seventh Amendment attack on Rule 59 motions for a new trial following jury verdict has also failed. 6A *Moore's Federal Practice*, para. 59.04[2] at 3712.

regard as the entry of judgment the preparation, on the approved form, and filing of a separate document, in this case entitled "Judgment", and the notice given thereon. Quite contrary to the purpose of amending the Rules in 1963, the question of when judgment is entered would again have become a pre-1963 guessing game where parties would be at unreasonable risk to guess right. Of course, because as demonstrated above the June 29 entry of judgment in this case was handled in the prescribed manner, as both courts below have held, no such questions arise, and no amount of argument from Petitioner can make it otherwise.

CONCLUSION

For the foregoing reasons, Real Parties in Interest Reynolds and Stanray respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated: May 28, 1971

Respectfully submitted,

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JAMES L. HUNT
Counsel for Real Party in Interest Reynolds Metals Company

MAX L. GILLAM
MICHAEL J. SHOCKRO
Counsel for Real Party in Interest Stanray Pacific Corporation

(Appendices Follow)

Appendix I

United States Court of Appeals
For the Ninth Circuit

No. 26915

Hallmark Industry,

Petitioner,

v.

Hon. Robert F. Peckham, District Judge, District Court for the Northern District of California,

Respondent,

And

Reynolds Metals Co., and Stanray Pacific Corp.,

Real Parties in Interest.

ORDER

Before: HAMLEY and HUFSTEDLER, Circuit Judges

Reynolds Metal Company and Stanray Pacific Corporation, the real parties in interest, are directed to file answers to the Petition for Writs of Mandamus and/or Prohibition within 20 days from the date of filing of this order. The judge named as respondent may file an answer if he so desires, or may advise the Clerk and the parties that he does not desire to appear, as provided in Fed. R. App. Proc. 21(b).

/s/ FREDERICK G. HAMLEY

/s/ SHIRLEY HUFSTEDLER

Circuit Judges

Appendix II

United States District Court
For the Northern District of California

No. Civil 47044-RFP

Hallmark Industry

vs.

Reynolds Metals Co. et al.

NOTICE

TO
Joseph L. Alioto, 111 Sutter St., San Francisco, CA
Matthew B. Weinberg, 235 Montgomery St.,
San Francisco, CA
McCutchen, Doyle, Brown & Enersen, 601 California St.,
San Francisco, CA
Gibson, Dunn & Crutcher, South Spring St.,
Los Angeles, CA
Latham & Watkins, 615 South Flower St., Los Angeles, CA

YOU ARE HEREBY NOTIFIED that on June 29, 1970 a DECREE JUDGMENT was entered of record in this office in the above-entitled case.

C. C. EVENSEN
Clerk, U.S. District Court
thk

San Francisco, California